IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No. 23 of 2004.

Judgement reserved on: 13.6.2007.

Date of decision: 3.8.2007.

Smt. Meena alias Jogmaya ….. Appellant.

Vs.

State of H.P. …. Respondent.

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1]

For the Appellant : Mr. Bharat Bhushan Sharma with Ms. Ritta Goswami, Advocates.

For the Respondent : Mr. Som Dutt Vasudeva, Additional Advocate General with Mr. D.S. Nainta, Deputy Advocate General.

Kuldip Singh, Judge.

This appeal has been filed by appellant against her conviction by the learned Sessions Judge, Mandi, in Sessions Trial No. 20 of 2003, on 23.10.2003, whereby she has been convicted and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/-, under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, the Act) and in default of payment of fine, to undergo rigorous imprisonment for a period of four years.

Whether the reporters of the local papers may be allowed to see the Judgment?

2. The prosecution story is that PW 10 Dabe Ram, SI/SHO, Police Station, Aut, PW 11 ASI Madan Lal and other police officials were present at Shalanala at about 5.15 p.m. on 5.1.2003 in connection with traffic checking. In the meantime, a bus came from Kullu side, which was stopped. PW 10 Dabe Ram, SI/SHO, alongwith some police officials entered the bus from the front door for checking. PW 11 Madan Lal ASI, entered the bus from the rear door. On checking, Dabe Ram SI apprehended Anita, an accused in some other case. On seeing PW 11 Madan Lal, a Nepali lady sitting in the bus on the right side of the last bench got down from the bus. She was stopped by Madan Lal ASI. The belly of the Nepali lady from appearance appeared abnormal. Madan Lal, ASI, gave her notice of search vide memo Ex. PB, whether she wanted to give her search to a Magistrate or any Gazetted lady officer or to lady constable Vandana. The Nepali lady gave her consent that she was ready to be searched by Vandana constable, thereupon PW 1 Vandana constable, vide memo Ex. PA gave her personal search. PW 1 Vandana thereafter carried out personal search of accused- appellant Meena. On search, 3 bundles were found tied around the waist of the appellant and on opening, were found carrying 15 packets of charas, weighing 2 Kgs. 600 grams. Two samples of 25 grams each were taken on the spot from the seized charas. The 2 samples and remaining charas was sealed. The Investigating Officer recorded the statements of the witnesses, prepared recovery memo, deposited the case property alongwith NCB forms and specimen seal etc. at Police Station with MHC and the case property was resealed by the S.H.O.

A special report was sent to the Superintendent of Police, Mandi. On receipt of report of Chemical Examiner, Kandaghat, the challan was filed in the court. After trial, the accused- appellant was convicted, as noticed above.

3. The appellant has assailed her conviction and sentence by way of present appeal.

4. We have heard the learned counsel for the parties and gone through the record.

5. The learned counsel for the appellant- accused has submitted that prosecution has failed to prove that the charas was recovered from the appellant. There is non-compliance of Sections 42 and 50 of the Act. Independent witnesses were not joined during the search. The prosecution has failed to prove the case beyond reasonable doubt. As per Chemical Examiner's report Ex. PP, the seized stuff had 28.78% resin, and, therefore, charas content in the stuff was less than commercial quantity and keeping in view this factor the sentence imposed is excessive. The learned Additional Advocate General has supported the impugned judgement.

6. PW 1 Smt. Vandana constable has stated that on 5.1.2003, she alongwith Madan Lal ASI, Dabe Ram, SHO, Chandermani constable, Ramesh Kumar MHC, Munsi Ram HC etc. was present at Shalanala in connection with patrolling and traffic checking. At about 4.30 p.m., a bus came from Manali side, which was stopped. She, Dabe Ram SI, Sant Ram, Chandermani boarded the bus from front door, whereas Madan Lal ASI, HC Ramesh and other constables boarded the bus from the rear door. When ASI

boarded the bus, a Nepali lady came out from the seat and she got down from the bus. She was called by the ASI and the lady disclosed her name as Meena Devi. ASI inquired from that lady, whether she wanted to give her search to a Magistrate or Gazetted Officer or to a lady constable PW 1 Vandana. Appellant gave her option, vide memo Ex. PB, which bears her signatures. She carried out her (Vandana) search and nothing incriminating was found and memo to this effect is Ex. PA. Thereafter she carried out the personal search of appellant and found 15 packets wrapped around her waist beneath her clothes, which on smelling were found containing charas. Munshi Ram constable brought scale and on weighment, the recovered charas was found 2 kgs. and 600 grams out of which two samples of 25 grams each were taken. Thereafter both parcels and samples were sealed in two different parcels and sealed with seal "T". The remaining charas was sealed in separate parcel and sealed with seal "T". The specimen seal Ex. PC bears her signatures and that of Hari Chand. The seal after use was handed over to Hari Chand. ASI filled up NCB forms and samples parcels were taken into possession, vide seizure memo Ex. PD, which bears her signatures. The property search and seizure memo is Ex. PE, which also bears her signatures. The appellant was supplied with the grounds of arrest, vide memo Ex. PF, which bears her signatures. This witness has been cross-examined at length by the defence counsel, but nothing favourable to the accused could be extracted from her cross-examination. She has admitted that there is no mention in her statement under Section 161, Cr.P.C. that contraband, in question, was recovered from the

appellant Meena. She was confronted with portion- A to A of her statement, under Section 161, Cr.P.C.

7. PW 2 Sant Ram constable, has stated that he alongwith ASI Madan Lal and one or two constables boarded the bus from the rear door. He has stated that on search of the appellant by lady constable Vandana, 15 packets of charas were found tied on the person of appellant, which on weighment found 2 Kgs. 600 grams of charas. From the recovered stuff, 2 samples of 25 grams each, were taken. The two samples of charas and remaining stuff were sealed by seal "T" in different parcels. Investigation Officer filled in NCB forms and took into possession parcels of charas. The Investigating Officer prepared a rukka and he took the same to the Police Station, Aut and handed over the same to MHC for recording FIR, who registered the same and then he brought the case file to the spot. PW 1 Vandana constable gave her personal search to the appellant vide memo Ex. PA, which bears his signatures.

8. PW 3 Hari Chand driver of the bus was declared hostile, but in cross-examination, he has admitted that option memo of appellant Ex. PB is signed by him, personal search memo Ex. PA of PW 1 Vandana also bears his signatures. He has admitted his signatures on search and seizure memos Ex. PD and Ex. PE. He has stated that he signed various documents on the next day at Police Station. He has, however, admitted that he was told that he was a witness to the recovery of charas. He has admitted his signatures on parcel Ex. P 2 as well as on sample seal. PW 4 Munshi Ram constable has stated that he was sent by the SHO to bring scale and

weights, which he brought from Aut from the shop of Amar Singh. He has stated that in the present case, 2 Kgs. 600 grams charas was recovered.

9. PW 5 Ram Lal HC has stated that Sant Ram constable handed over rukka of ASI Madan Lal, on the basis of which he recorded FIR Ex. PH. He made an endorsement Ex. PJ on rukka. On the same day, Dabe Ram SI/ SHO handed over one parcel of charas recovered in the case, which was sealed with seal "A", containing 2 Kgs. 550 grams charas and two parcels of charas samples weighing about 25 grams each sealed with seal impression "A" alongwith specimen seals of seal "A" and "T", search seizure memo and NCB form (i), which he entered in Malakhana register at Serial No. 232/3, extract of which is Ex. PK. On 6.1.2003, ASI Madan Lal handed over an envelop of special report to him, which he sent to Superintendent of Police, Mandi through constable Puran Singh at 11.00 a.m. On 6.1.2003, he sent one sample of charas alongwith NCB form and other documents i.e. copy of the specimen seal, copy of the FIR etc. vide RC No. 4/03 Ex. PL through HC Sarwan Kumar to CTL, Kandaghat, who on return handed over to him.

10. PW 6 Puran Chand constable has stated that on 6.1.2003, HC Ram Lal handed over an envelop containing special report of the case to him at 11.00 a.m., which he handed over to Addl. Superintendent of Police at 12.15 p.m. in his office. PW 7 Jeet Ram constable has stated that in January 2003, he was posted as Assistant Reader to Addl. Superintendent of Police, Mandi. On 6.1.2003, Addl S.P., Mandi Sunil Kumar handed over special report

Ex. PM in case FIR No. 6/03, which he had brought in original in the court and endorsement of Addl. S.P. on it is Ex. PM/1 and his endorsement is Ex. PM/2. PW 8 Amar Singh has deposed that on 5.1.2003, he gave scale and weights to Munshi Ram constable, who returned to him after some time. PW 9 Sarwan Kumar constable has stated that on 6.1.2003 Ram Lal HC handed over to him one parcel of charas of the case, which was sealed with seal impression "A" alongwith other documents i.e. NCB form, seizure memo, copy of FIR and specimens of seal "A" and "T", vide RC No. 4 /03, which he deposited with the Chemical Examiner at Kandaghat on 7.1.2003. On return, the receipt was handed over to MHC.

11. PW 10 Dabe Ram, SI/SHO has stated that on 5.1.2003, he alongwith other police officials was present at Shalanala for traffic checking, a bus from Kullu side came and was stopped. He boarded the bus alongwith some police officials from the front door, ASI Madan Lal and other police officials boarded the bus from the rear door of the bus. He conducted the investigation of the case pertaining to case of Anita, whereas ASI Madan Lal conducted the case pertaining to Meena Devi. He returned to Police Station at about 9.15 p.m. ASI Madan Lal on his arrival in the Police Station, produced three parcels namely two samples of charas and one of remaining charas of the present case, which was sealed with seal impression "T". Thereafter he again resealed all the three parcels with his own seal "A". ASI Madan Lal also produced NCB forms dully filled in. He affixed specimen of his seal "A" on NCB forms besides taking specimens of seal on pieces of clothes Ex. PO. He handed

over the case property, NCB forms, specimen seals to MHC Ram Lal for safe custody. He received report of the Chemical Examiner Ex. PP. The other part of the sample Ex. P-5 bears his signatures. The wrapper of the remaining charas Ex. P-1 also bears his signatures.

12. PW 11 Madan Lal ASI has stated that on 5.1.2003, he was at place Shalanala alongwith Dabe Ram SI/SHO and other police officials in connection with traffic checking, a bus from Kullu side came, which was stopped. Dabe Ram boarded the bus alongwith some police officials from the front door. He alongwith constable Ramesh Kumar, Sant Ram etc. boarded the bus from the rear door. On seeing him in the bus, a lady sitting on the right side near the window on the last bench got down from the bus, but was stopped by him. He inquired the name of the lady who had got down and she disclosed her name as Meena. He called Vandana constable and he associated Vandana, Hari Chand driver in the investigation. The belly of the lady Meena from appearance appeared abnormal. On suspicion, he apprised the lady whether she wanted to give her search to Magistrate or any Gazetted lady Officer or to lady constable Vandana. She gave her consent to be searched by lady constable Vandana. He gave this option vide memo Ex. PB, on which Meena put her thumb impression and was also signed by Hari Chand and Vandana, as witnesses. Thereafter, Vandana gave her personal search to Meena and nothing incriminating was recovered from Vandana. On personal search of Meena, 15 packets of charas wrapped around her waist were found, out of which 14 packets were found round shaped and one packet stick shaped. The recovered

charas was weighed and on weighment it was found 2 Kgs. 600 grams. From all packets small quantity of charas was taken in the form of two samples of 25 grams each. Thereafter both the samples were sealed in the two different parcels with seal impression "T". Thereafter he filled up NCB forms Ex. PQ and took specimen seal on separate cloth and parcels were taken into possession, vide seizure memos Ex. PD and Ex. PE, which bears the signatures of Hari Chand and lady constable Vandana. The seal after use was handed over to Hari Chand. He prepared rukka Ex. PR, which was sent to Police Station Aut for registration of the case through constable Sant Ram. Spot map Ex. PX was prepared, which bears his signatures. He recorded the statements of witnesses. Thereafter he carried the case property and the appellant to Police Station and produced the case property to SI Dabe Ram with specimen seal etc. Dabe Ram SI/SHO resealed the samples and remaining charas with seal impression "A" and deposited the same with MHC. On 6.1.2003, he prepared the special report Ex. PM which he handed over to MHC and then it was sent to Superintendent of Police, Mandi. The carbon copy of the report is Ex. PV. The wrapper of parcel Ex. P-1, bears his signatures and the signatures of the witnesses.

13. The appellant in her statement, under Section 313, Cr.P.C., has admitted that when ASI Madan Lal entered the bus she was traveling in the bus. She has stated that witnesses have deposed falsely. The police made out a false case against her to misappropriate her golden earrings and the currency she was having, which she refused to give to the police.

14. The learned counsel for the appellant has submitted that the prosecution story right from the very beginning is suspicious. He has submitted that bus number in which appellant was travelling was initially mentioned HP-31-6630, but in evidence the witnesses have given bus No. HP 31-6603. The search and seizure was allegedly conducted by PW 1 Vandana, who was not competent under the Act. There is violation of Sections 42 and 50 of the Act. PW 1 Vandana has made improvements in her statement in the court. The independent witness PW 3 Hari Chand has not supported the prosecution case. Ex. DX memo regarding personal search and seizure of appellant proves that charas was not recovered from her. He has ultimately submitted that as per Chemical Examiner's report Ex. PP, resin content in the recovered stuff was 28.78%, and, therefore, the alleged contraband was less than commercial quantity of charas.

15. No doubt, in special report Ex. PM and its copy Ex. PV, rukka Ex. PR etc. the bus No. has been mentioned HP 31-6630, in which appellant was travelling when the bus was stopped at Shalanala and was checked by the Investigating Officer PW 11 Madan Lal etc. It has also come in special report that Hari Chand was the driver of the bus. PWs No. 1 to 4, 10 and 11 in their statements in the court have given bus No. HP 31-6603, which was stopped at Shalanala on 5.1.2003 and was checked by PW 11 Madan Lal etc. on that date. It appears there is some confusion regarding the bus number, but it does not make any difference, inasmuch as the appellant in her statement while replying to question No.5, under

Section 313, Cr.P.C. has specifically admitted that she was traveling in the bus when ASI Madan Lal entered the bus alongwith other officials and on inquiry of ASI Madan Lal, she disclosed her name Meena Kumari. Therefore, the confusion of bus number does not make any difference when appellant herself has admitted that she was travelling in the bus when ASI Madan Lal entered the bus and checked the passengers. The appellant can not take the benefit of this contradiction, which is not of any significance, in view of the fact that appellant has not denied that she was traveling in a bus, which was checked by ASI Madan Lal.

16. The learned counsel for the appellant has submitted that PW 1 Vandana Kumari was constable and she was not competent to conduct search and seizure of alleged contraband from the appellant, as alleged by the prosecution. There is violation of Sections 42 and 50 of the Act. He has submitted that under the Act, a constable has no authority to search and seize the contraband. The Act is stringent and it is to be complied with in letter and spirit. He has submitted that the search and seizure was allegedly conducted by PW 1 Vandana constable. Hence it knocks at the root of the case. He has submitted that once the very foundation of the case is in violation of the Act, then it vitiates the investigation and the resultant conviction after trial. He has relied **Roy V.D. vs. State of Kerala** [AIR 2001 SC 137], for the proposition, that any collection of material, detention or arrest of a person or search of a building or conveyance or seizure effected by an officer not being an empowered officer or an authorized officer under S. 41(2) of the Act, lacks sanction of law and is inherently

illegal and as such the same cannot form the basis of a proceeding in respect of offences under Chapter IV of the Act and use of such a material by the prosecution vitiates the trial. In the present case, the accused being a lady, and, therefore, PW 11 Madan Lal ASI under his supervision got the search and seizure conducted through PW 1 lady constable Vandana, which is otherwise the requirement of Section 50 (4) of the Act. The search and seizure by PW 1 Vandana of the appellant under the supervision of PW 11 Madan Lal ASI cannot be termed illegal. The contraband recovered from the appellant by PW 1 Vandana under the supervision of PW 11 Madan Lal cannot in any manner be termed as illegal recovery. Therefore, this contention of the learned counsel for the appellant is rejected.

17. The learned counsel for the appellant has submitted that offending material much-less charas was recovered from the appellant when appellant was searched. He has submitted that independent witness PW 3 Hari Chand has not supported recovery of charas from appellant. PW 1 Vandana constable is an interested witness and therefore, it is not safe to rely on her statement regarding recovery. There is no corroboration from independent witness of the recovery. Ex. DX memo prepared at the time of personal search of appellant proves that appellant was not carrying any offending stuff with her. The recovery of charas weighing 2 Kgs 600 grams from the person of appellant has been proved by PW 1 Vandana. In her statement, under Section 161, Cr.P.C. she has named Anita and not Meena. This discrepancy is not so serious to exclude the other positive evidence on record regarding the recovery of charas from the

appellant. It has come on record that at the relevant date and time when the bus was checked, PW 1 Vandana constable initially boarded the bus from the front door alongwith PW 10 Dabe Ram. They searched another accused Anita and then PW 1 Vandana and PW 11 searched the appellant. PW 1 Vandana constable on that date was associated in the search of two ladies Anita and the appellant, therefore, in her statement, under Section 161 Cr.P.C. she has referred the name of Anita. There is sufficient material on record, which has been proved by the prosecution that appellant was searched by PW 1 under the supervision of PW 11. The recovery of contraband from appellant has been corroborated by PW 2 Sant Ram and PW 11 Madan Lal. No doubt, PW 3 Hari Chand driver of the bus turned hostile, but in cross examination on material points, he has supported the prosecution story. He has admitted his signatures on recovery memo Ex. PD. The learned counsel for the appellant has submitted that Ex. DX proves that wrist watch, some currency notes, purse, memo of consent and notice of arrest were recovered from the person of appellant at the time of search. Ex. DX memo was prepared at the time when appellant was put up in lock up. This is clear from the fact that copy of consent form and notice of arrest are also mentioned in memo Ex. DX which were recovered from the appellant. The memo Ex. DX was prepared before putting the appellant in lock up much after the search and seizure of appellant at Shalanala when she came out of the bus and therefore, it cannot be said that at the time of search and seizure of the appellant vide memo Ex. PD and Ex. PE which were signed by PW 1 Vandana, PW 3

Hari Chand and thumb marked by the appellant at Shalanala, no contraband was recovered from her.

18. The prosecution has proved that after the search and seizure, 2 Kgs. 600 grams of charas was recovered from the person of appellant. Thereafter two samples of 25 grams each were taken according to the procedure. The Investigating Officer sealed the samples and rest of the charas. The NCB forms were filled in. Thereafter seals, samples, remaining charas, NCB forms etc. were deposited in the Malkhana, which was entered in Malkhana register and the sample was sent to Chemical Laboratory, Kandaghat. The report of the Chemical Examiner, Kandaghat Ex.PP clearly shows that the sample analysed by the Chemical Examiner contained content of charas having resin 28.78%. The prosecution has thus proved that contraband recovered from the appellant was charas. The learned counsel for the appellant has failed to make out any case of violation of Sections 42 and 50 of the Act. The learned Sessions Judge has rightly convicted the appellant, under Section 20 of the Act.

19. The learned counsel for the appellant has submitted that resin content in the contraband, as per Chemical Examiner report Ex. PP, was 28.78%. Therefore, whole of the stuff weighing 2 Kgs. 600 grams recovered from the appellant cannot be termed charas. In the recovered stuff, charas was only 28.78% and rest of the material was not charas and in support of this submission he has relied a Divison Bench judgement of this Court in Criminal Appeal Nos. 491 and 510 of 2003, decided on 15.5.2007. The submission of the learned

counsel for the appellant is that on the basis of resin percentage in the recovered stuff, the quantity of charas comes to 748.28 grams, which is less than the commercial quantity. He has submitted that in view of this, the appellant is entitled to lenient view in the matter of sentence. We have considered this submission of the learned counsel for the appellant. The resin content in the recovered stuff was found 28.78% by the Chemical Examiner, in his report Ex. PP. The total quantity of the contraband recovered from the appellant was 2 Kgs. 600 grams, the resin content in recovered stuff which alone is charas within the meaning of Section 2 (iii) (a) of the N.D.P.S. Act as held by a Division Bench of this court in **Criminal Appeal Nos. 491 and 510 of 2003, titled Dharam Pal** vs. **State of H.P., decided on 15.5.2007**, was 28.78%, therefore, it can be safely held that appellant was carrying 748.28 grams charas in the stuff which was recovered from her, vide search and seizure memos Ex. PD and Ex. PE.

20. The result of the above discussion is that the conviction of the appellant by the learned Sessions Judge is upheld, but keeping in view the fact that she was carrying 748.28 grams charas, which is less than the commercial quantity, the sentence awarded by impugned judgement is modified and reduced, the appellant-accused is sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.25,000/-. In default of payment of fine, the appellant-accused shall undergo rigorous imprisonment for one year

21. The appeal is accordingly disposed of.

August 3 , 2007. **(Kuldip Singh), Judge.** **(Surjit Singh), Judge.**

(*Hem*)